Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

12-80

In re the Matter of	)	File No. CSR-8605-P
	)	
COMPLAINT OF SKY ANGEL U.S., LLC	)	FILED/ACCEPTED
	)	
Against Discovery Communications, LLC, *et. al.*	)	MAY - 6 2010
For Violation of the Commission's Competitive	)	Federal Communications Commission
Access to Cable Programming Rules	)	Office of the Secretary

To: Media Bureau

REPLY TO ANSWER TO PROGRAM ACCESS COMPLAINT

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Sky Angel U.S., LLC ("Sky Angel"), by its attorneys, and pursuant to Section 76.1003(f) of the Commission's rules,[1] hereby submits this Reply to the Answer filed by Discovery Communications, LLC and its affiliate, Animal Planet, L.L.C. (collectively "Discovery") on April 21, 2010 in response to the Program Access Complaint filed by Sky Angel on March 24, 2010 ("Complaint"). Sky Angel respectfully requests that the Commission resolve the Complaint within the applicable five-month period for denial of programming cases.[2]

I. SUMMARY AND INTRODUCTION

A failure by the Commission to protect current and potential Sky Angel subscribers through a sensible application of program access requirements intended to foster competition and innovation by multichannel video programming distributors ("MVPDs") would be contrary to law and the public interest for any number of reasons, including that:

(i) It will result in a crabbed and untenable statutory interpretation that is arbitrary and inconsistent with the Communications Act and the Commission's own rules;

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[1] 47 C.F.R. §76.1003(f).

[2] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, Report and Order, 22 FCC Rcd 17791, 17856 (2007). However, given the limited substantive disputes offered by Discovery's Answer, Sky Angel believes that the Commission can and should act more quickly than its self-imposed deadline in order to restore Discovery programming to Sky Angel's subscribers and other consumers considering Sky Angel's family-friendly MVPD service.

(ii) It will adversely affect the many consumers nationwide who would prefer to use Sky Angel's family-friendly service, as well as reduce beneficial competition from innovative video programming distributors; and

(iii) It will deny the Commission authority with respect to many other innovative video programming distributors – or traditional cable systems – that may use the Internet as a link in their distribution chain, including, but not limited to, over-the-top distributors.

Notwithstanding the blanket denials contained in Discovery's Answer, there is no serious dispute as to the key facts of this proceeding:

- Sky Angel offers subscribers throughout the United States a means to access family-friendly video programming;
- Subscribers cannot access Sky Angel's encrypted programming without the use of a proprietary set-top box that they connect directly to a single television set;
- The set-top box is the final link in Sky Angel's distribution system, and Sky Angel remotely controls the set-top box, including the ability to terminate service;
- Consumers pay subscription fees on a per-set-top box basis;
- Sky Angel has entered into agreements with many video programming providers for the right to distribute their programming to subscribers;
- In 2007, Sky Angel and Discovery entered into an Affiliation Agreement for the distribution of Discovery programming. The term of this agreement, which is governed by Maryland law, does not end until December 31, 2014;
- The Affiliation Agreement contains a negotiated definition of "IP System," which accurately describes Sky Angel's two-part distribution system;
- Neither the Affiliation Agreement nor any documentary evidence describes the relationship created by the Affiliation Agreement as an "experiment;"
- In September 2009, Discovery requested that Sky Angel begin distributing additional Discovery networks;
- On April 22, 2009, Discovery terminated delivery of its programming to Sky Angel;
- Prior to April 22, 2009, several Discovery networks were among the channels most watched by Sky Angel subscribers; and
- Discovery is a vertically integrated programmer subject to the program access rules.

All that remains in serious dispute are two legal issues:

- Are the consumers of Sky Angel, with their proprietary set-top boxes, within the protections of the program access rules that were intended to protect innovative and competitive multichannel video programming distributors?

- Is Discovery's withholding of its programming from Sky Angel unfair, discriminatory or otherwise contrary to the program access rules, which were intended to preclude vertically integrated programmers from harming actual or potential competitors?

As demonstrated below, Sky Angel is an MVPD protected by the program access rules and Discovery's abrupt and arbitrary decision to withhold its programming from Sky Angel was unfair and discriminatory under those rules. Accordingly, the Commission should grant Sky Angel's Complaint.

II. SKY ANGEL IS AN "MVPD" ENTITLED TO RELIEF UNDER THE PROGRAM ACCESS RULES

Any ruling by the Commission that excludes from the protection of its program access regulations the subscribers of Sky Angel, an innovative and family-friendly video programming distributor that makes available for purchase multiple programming channels through a series of communications links that require every subscriber to use the hardware and fixed transmission path within a proprietary set-top box in order to access the programming is contrary to the public interest and to the language and purpose of the Communications Act and Commission regulation. The program access rules, as set forth in Section 628 of the Communications Act and Sections 76.1000 *et seq.* of the Commission's Rules, intend to sweep broadly, as their fundamental purpose was to encourage and protect new or emerging competition in the video programming market.[3] The Communications Act broadly defines a multichannel video programming distributor as:

[3] *See Review of the Commission's Program Access Rules and Examination of Programming Tying Arrangements*, First Report and Order, 25 FCC Rcd 746, 754 (2010) ("*Terrestrial Rules Order*").

> [A] person such as, but not limited to, a cable operator, a multichannel multipoint distribution service, a direct broadcast satellite service, or a television receive-only satellite program distributor, who makes available for purchase, by subscribers or customers, multiple channels of video programming.[4]

Consistent with the sweeping intent of the program-access provisions, Section 76.1000(e) of the Commission's Rules offers an even broader definition of an MVPD:

> The term "multichannel video programming distributor" means an entity engaged in the business of making available for purchase, by subscribers or customers, multiple channels of video programming. Such entities include, but are not limited to, a cable operator, a BRS/EBS provider, a direct broadcast satellite service, a television receive-only satellite program distributor, and a satellite master antenna television system operator, as well as buying groups or agents of all such entities.[5]

Based on the plain language and any reasonable interpretation of these definitions, Sky Angel is an MVPD for purposes of the Commission's program access rules.

A. Congress Intended for the Term "Multichannel Video Programming Distributor" to be Interpreted Broadly.

Had Congress intended to limit the application of its requirements to some multichannel distributors, but not others, it would have enacted a specific, limiting definition of an MVPD. It has not done so. Rather, Congress enacted a statutory definition of MVPD open-ended in scope[6] and broad in its coverage[7] to provide the Commission the "flexibility"[8] necessary to address the entry of new video programming distributors into the marketplace. Moreover, a broad interpretation of Congress' MVPD definition is in accord with the generally "broad and

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[4] 47 U.S.C. §522(13) (emphasis added).

[5] 47 C.F.R. §76.1000(e) (emphasis added).

[6] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Notice of Proposed Rulemaking, 8 FCC Rcd 194, fn. 13 (1992).

[7] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Notice of Proposed Rule Making, 7 FCC Rcd 8055, ¶ 42 (1992) ("*Program Carriage NPRM*") ("[T]he literal language of the 'multichannel video program distributor' definition is broad in its coverage . . .").

[8] *Id.*

sweeping" terms of the Act's program access provisions[9] and the broad authority granted the Commission to enforce those provisions.[10]

Legislative history supports a broad interpretation. For instance, the program access rules were created to ban vertically integrated cable programmers "from unreasonably refusing to deal with any multichannel video distributor . . ."[11] In addition, the purpose of program access – ensuring competition[12] – is best served by a definition that does not pick and choose among MVPD competitors at the consumer's expense. Communications policy should avoid, whenever possible, giving some competitors special privileges not provided to other distributors, and parity in treatment among competing MVPDs furthers the goal of fostering a competitive marketplace.

Finally, a broad interpretation anticipates the entry of new multichannel distributors into the marketplace. The Commission has acknowledged that the term "multichannel video programming distributor" is used extensively throughout the statute.[13] However, the statute provides only the single MVPD definition noted above, which, by its terms, includes any service that makes available for purchase by consumers multiple channels of video programming and does not purport to offer an exhaustive list of such services. Moreover, forcing Congress to act each time a new distribution technology emerges is simply bad public policy that would create confusion in the marketplace, deter investment in innovative technologies and impede competition. Therefore, it is clear that the program access requirement was intended to apply to

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[9] *NCTA v.* FCC, 567 F.3d 659, 664 (D.C. Cir. 2009) (concluding that the program access provisions were written in "broad and sweeping terms" and "should be given broad, sweeping application.").

[10] *See, e.g., id.* at 665 ("Congress had a particular manifestation of a problem in mind, but in no way expressed an unambiguous intent to limit the Commission's power solely to that version of the problem.").

[11] S. Rep. No. 102-92, 1992 U.S.C.C.A.N. 1133, 1161 (1991) (emphasis added).

[12] *See id.* at 1160 (noting that Congress, in drafting the program access requirements, "focus[ed] on ensuring competitive dealings . . . between programmers and competing video distributors.").

[13] *See, e.g., Program Carriage NPRM*, 7 FCC Rcd 8055, ¶ 42.

all present and future multichannel video programming distributors.[14] Otherwise, vertically integrated cable programmers could permissibly discriminate against innovative competitors such as Sky Angel, whose particular service could not have been envisioned in 1991 during the drafting of the Cable Act.

B. The Non-Exhaustive List of Examples Does Not Limit the Definition of an MVPD.

Although an over-the-top IPTV system that requires a subscriber to use proprietary hardware to access the service's video programming is not specifically delineated in the list of examples contained in the definition, the statutory language is clear that the intentionally broad definition of MVPD is not limited to the examples given, but rather encompasses any entity that otherwise fits within the flexible definition of an MVPD.[15] Regardless, any comparison of the enumerated services demonstrates that Sky Angel, for purposes of the program access rules, is no less an MVPD than one or more of the listed services, including a multichannel multipoint distribution service ("MMDS"), a direct broadcast satellite ("DBS") service, or a satellite master antenna television ("SMATV") system operator.

Like these long-recognized MVPDs, Sky Angel relies on several common steps to aggregate and distribute programming, as detailed in Attachment A of the Complaint. Programming is delivered to Sky Angel through multiple satellite uplinks and downlinks, which

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[14] *See Implementation of Sections 12 and 19 of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, First Report and Order, 8 FCC Rcd 3359, 3365 (1993) ("*First Program Access Order*") ("The program access requirements of Section 628 have at their heart the objective of releasing programming to the existing or potential competitors of traditional cable systems so that the public may benefit from the development of competitive distributors.").

[15] *See Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Broadcast Signal Carriage Issues*, Report and Order, 8 FCC Rcd 2965, 2997 (1993) ("[T]he list of multichannel distributors in the definition is not meant to be exhaustive . . ."); S. Rep. No. 102-92, 1992 U.S.C.C.A.N. at 1161 ("To encourage competition to cable, the bill bars vertically integrated . . . programmers from unreasonably refusing to deal with any multichannel video distributor . . .") (emphasis added). Recently, the Commission defined MVPD without any reference to specific examples. *See Connecting America: The National Broadband Plan*, Appendix C (rel. Mar. 16, 2010) ("*Broadband Plan*").

are controlled by Sky Angel. Sky Angel then encodes, bundles, and encrypts the programming, which it transmits by fiber it controls to "headends" in New York City and Palo Alto, from which the programming is sent via IP technology through broadband Internet connections – not via the World Wide Web – to subscribers. Sky Angel subscribers cannot receive the programming without a proprietary set-top box provided by Sky Angel that they connect to a single television set. At all times, Sky Angel directly and remotely controls the set-top box for purposes ranging from periodic service and software updates to service termination. Sky Angel thus controls this last-mile aspect of its distribution system even if a subscriber opts to purchase outright the set-top box.

Several MVPDs enumerated in the program access rules use similar transmission models, or otherwise have transmission links that are not "closed" to any party that has specific end-user equipment. For example, a DBS system broadly distributes programming throughout the United States which is received, like with Sky Angel's channels, by any party that has the appropriate home equipment – in the case of DBS, a small satellite dish and the associated set-top box.[16]

Similarly, many SMATV systems, which have always been covered by the program access rules, receive video programming by one or more satellites, over-the-air, or by microwave antennas and then redistribute these signals to the various units of a housing complex or hotel. An SMATV operator simply provides the final path in its service's distribution chain. Although these distributors are not cable systems, and may receive unencrypted broadcast signals directly from open broadcast transmissions that are available to any consumer with the necessary reception equipment, they have been included in the definition of MVPDs for purposes of the

[16] DBS systems also rely on a return path. Without this path, subscribers can only access limited programming. The return path, however, is not provided by the DBS provider, but is a simple telephone line. *See, e.g.*, http://support.directv.com/app/answers/detail/a_id/269/session/L3NpZC9yQnphTzFfag%3D%3D/p/447%2C992/r_id/104513/sno/0 (last viewed May 4, 2010).

program access rules. The fact that some SMATV systems may rely on the open transmission of programming from a broadcaster or other sources does not disqualify them from being deemed an MVPD so long as they are provided for purchase. As detailed in Attachment A of the Complaint, Sky Angel provides a unique transmission path for multiple aspects of its distribution chain, including the final path contained in the set-top box.

C. The Definition of an MVPD Encompasses Sky Angel's Service.

Under either the statutory or regulatory definition of MVPD, as long as three elements are met – *i.e.*, the entity (1) makes available for purchase, by subscribers or customers (2) multiple channels (3) of video programming – the entity qualifies as an MVPD and its customers are protected under the program access rules.

1. "Make available for purchase, by subscribers or customers."

Sky Angel inarguably makes available for purchase video programming to subscribers throughout the United States. Sky Angel enters into contracts with programmers whereby it obtains the right to distribute their programming in return for payments made on a per-subscriber basis, it distributes this programming – which would not otherwise be available except through another MVPD – to its customers for a subscription fee, and it directly handles all customer service aspects of its business.[17]

The Commission has made clear that the critical factor in determining whether an entity makes video programming "available" is direct contact with consumers because Congress intended to promote competition among MVPDs at the retail level.[18] For instance, when there is

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[17] *See Wizard Programming, Inc. v. Superstar/Netlink Group, L.L.C.*, Memorandum Opinion and Order, 12 FCC Rcd 22102, 22111 (1997).

[18] *See World Satellite Network, Inc. v. Tele-Communications, Inc.*, Memorandum Opinion and Order, 14 FCC Rcd 13242, ¶ 25 (1999) ("[I]n adopting the program access provisions, we believe that Congress meant to promote competition among MVPDs at the retail level so that subscribers or customers could receive the benefits of that competition through more programming choices at lower prices.").

more than one entity in the chain of distribution paths, the Commission applies the MVPD designation to the entity "directly selling programming and interacting with the public."[19] This interpretation is consistent with the plain reading of the statute, which requires an MVPD to "make[] available for purchase, by subscribers or customers, multiple channels of video programming."[20]

In attempting to read more into the "make available" portion of the MVPD definition than intended by Congress, Discovery incorrectly asserts that Sky Angel "has no control" over the transmission of programming to its subscribers.[21] As demonstrated above, and detailed in Attachment A of the Complaint, Sky Angel exercises total control – including quality control – over various transmission paths prior to its service connecting to the Internet, and it also controls the final transmission path, which passes through the set-top box. Sky Angel has the ability, at all times, to interact directly with the set-top box from a remote location. Significantly, total control of an entire transmission system is not a necessary element of fitting within the definition of an MVPD. Very few long-recognized MVPDs control every step of the entire transmission path that delivers video programming to consumers. In addition, even if the term "transmission" is relevant to this inquiry – which it is not because nowhere in the MVPD definition does this or

[19] *See Program Carriage NPRM*, 7 FCC Rcd 8055, ¶ 42 ("[W]here there is a differentiation between an entity performing a service delivery function and an entity selling programming that is delivered over the facilities of another, it appears logical that the retransmission consent obligation should fall on the entity directly selling programming and interacting with the public . . . Similarly, where there is a chain of distribution to the public potentially involving more than one multichannel video program distributor, it would appear consistent with the objectives of the 1992 Act for the obligation involved to inure to the distributor in the chain that interacts directly with the public.").

[20] 47 U.S.C. §522(13).

[21] *See Answer*, p. 16.

a similar term appear – the term simply would require that the MVPD actively participates in the selection and distribution of video programming.[22] Sky Angel does exactly this.

Sky Angel is solely responsible for acquiring its programming and for every direct consumer contact aspect of its service. As a consequence, Sky Angel "makes available for purchase, by subscribers or customers," the multiple channels of video programming its paying subscribers access from Sky Angel's service.

2. "Multiple channels."

Discovery disputes whether Sky Angel's video programming offerings include "multiple channels," contending that the definition of "channel" implies the use of "MVPD facilities" and then defining the term "facilities" as being based on the Act's definition of "cable channel."[23] However, nothing in the language or purpose of the Act or Commission regulations, which are intended to protect consumers seeking to access particular programming, limits an MVPD to a service that uses a particular set of facilities.[24] Rather, as it did in other portions of the act relating to technology, Congress used potentially technical terms in an everyday sense.[25]

"Channels" is defined many ways in the Act. However, with respect to a rule intended to include any type of MVPD, the term cannot be defined by any reference that is expressly

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[22] *See Telephone Company-Cable Television Cross-Ownership Rules*, Memorandum Opinion and Order on Reconsideration, 7 FCC Rcd 5069, ¶¶ 15-16 (1992) ("The term 'transmission' is not defined in the Cable Act and the intended scope of the definition is ambiguous . . . We believe that it is more consistent with Congressional intent to interpret the term 'transmission' as requiring active participation in the selection and distribution of video programming."); *Inquiry Concerning High-Speed Access to the Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd 4798, 4834 (2002) ("The Commission has previously interpreted the term 'transmission' in the cable services definition 'as requiring active participation in the selection and distribution of video programming,' an interpretation that the D.C. Circuit has upheld.").

[23] *See Answer*, p. 16.

[24] In fact, a "buying group" does not operate or control any set of facilities.

[25] *See Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*, Report and Order, 14 FCC Rcd 5298, 5356 (1999) ("'Transmission technology' is not a defined term in the Communications Act nor does the legislative history help to define its breadth. Rather, Congress appears to have used the phrase in the everyday sense in which it has been used in discussions of communications policy issues.") (emphasis added).

technology-specific. In both the language of the Cable Act and the underlying Conference Report, Congress made plain that the program-access rules were not intended to be limited to competitive cable distributors or video distributors using any specific type of technology. Rather, Congress explained that the program access protections extended to video programming distributors of many sorts:

> Without fair and ready access on a consistent, technology-neutral basis, an independent entity . . . cannot sustain itself in the market.[26]

The statutory definition itself offers a list of distributors, each with its own unique hardware and distribution strategies, with a single obvious purpose: to make manifest the stated Congressional goal that Section 628 was intended to "spur the development of communications technologies" and was not to be limited to a few potential competitors. Accordingly, the phrase "multiple channels" cannot be defined in a way that would limit it only to a cable system, or a satellite system, or any specific technology, but must be defined in a way that would be reasonable with respect to all video programming distribution technologies.

With that backdrop, it is apparent that the only definition of "channel" in Title VI was not meant to define the term for purposes of Section 628. Under that definition, which expressly uses the term "channel" as shorthand for "cable channel,"[27] a channel must be a portion of spectrum "which is used in a cable system and which is capable of delivering a television

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[26] S. Rep. No. 102-92, 1992 U.S.C.C.A.N. at 1159 (emphasis added); *see also* 47 C.F.R. §76.1002(b)(1), Note 2 (listing potentially reasonable factors for differences in treatment so long as these factors are "applied in a technology neutral fashion."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order on Reconsideration of the First Report and Order, 9 FCC Rcd 1902, 1950 (1994) ("*Program Access Recon. Order*") ("Congress did not differentiate among the technologies used by competitors in the program access provisions, but rather sought 'to promote the public interest, convenience, and necessity by increasing competition and diversity in the multichannel video programming market.").

[27] 47 U.S.C. §522(4) ("the terms 'cable channel' or 'channel' means a portion of the electromagnetic frequency spectrum which is used in a cable system and which is capable of delivering a television channel (as television channel is defined by the Commission by regulation).").

channel."[28] Accordingly, the only definition of channel offered in Title VI refers expressly to that term in the context of a cable system, which is a narrower class than an MVPD. For Discovery to rely on a definition of channel expressly limited to the use of a cable system is contrary to the statutory language, Congressional intent, and the Commission's own rules.

Moreover, the use of a cable-specific definition of "channel" to limit what constitutes an MVPD would be contrary to many of the express examples of MVPDs that Congress itself provided in the Act. Neither a satellite system nor an MMDS system utilize "a portion of the electromagnetic frequency spectrum which is used in a cable system"[29] because neither is, by definition, a cable system. Yet both an MMDS and DBS are expressly named as examples of an MVPD that is to be protected by the program access rules. In short, because a cable system is a mere subset of the class of distributors intended to be classified as an MVPD, no definition of channel that is defined only in terms of a cable system can rationally be used to limit what should constitute an MVPD.

Discovery's attempt to define the term "channel" as it appears in the MVPD definition by tying it to a separate definition applicable only to cable systems conflicts with the plain language of the statute, as well as Congressional and Commission intent. Because Congress did not define "channel" as it was used in the MVPD definition, the only reasonable and non-arbitrary way to interpret the term for purposes of the program access rules is to use the term in a manner consistent with: (i) the purpose of the specific legislative provision; and (ii) other statutes or rules applicable to MVPDs. Both means of inquiry demonstrate that Sky Angel's customers are intended to be protected under the program access rules.

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[28] *Id.* (emphasis added).

[29] *See id.* Nor do these MVPDs use a "signaling path as provided by a cable television system . . ." *See* 47 C.F.R. §76.5(r)-(u) (defining the various cable television channel classes).

First, the clear intent of the rule is to protect the ability of a customer of a particular video programming distributor to access one or more programming networks – in other words, the Discovery Channel or other programming "channels" – from that preferred distributor and to "spur the development of communications technologies."[30] An MVPD customer does not need to know how the distributor delivers the programming, whether via the Internet, over-the-air spectrum, closed cable, or some combination of these. Accordingly, the definition of a channel, or multiple channels, should not require any particular means of technology or, indeed, any particular sort of transmission path. Similarly, that a customer may need its own transmission service seems irrelevant as to whether a customer should be protected from being denied access to some programming after that customer already had chosen the sort of video programming distributor through which the customer wants to access that programming. Significantly, certain long-recognized MVPDs also require subscribers to have access to and utilize an independent transmission service.[31]

Second, other statutes, rules and Commission decisions confirm that "multiple channels," as used in the MVPD definition, is meant to refer to multiple programming networks – *i.e.*, programming channels defined in the non-technical sense intended by Congress. For example, Section 614(b)(6) of the Act provides:

> CHANNEL POSITIONING. Each signal carried in fulfillment of the carriage obligations of a cable operator under this section shall be carried on the cable system channel number on which the local commercial television station is broadcast over the air . . . or on such other channel number as is mutually agreed upon by the station and the cable operator."[32]

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[30] *See* 47 U.S.C. §548(a).

[31] For instance, unless they utilize their home telephone line, DBS subscribers can only access limited programming.

[32] 47 U.S.C. §534(b)(6) (emphasis added); *see also* 47 U.S.C. §543(b)(8)(A) ("A cable operator may not discriminate between subscribers to the basic service tier and other subscribers with regard to the rates charged for video programming offered on a per channel or per program basis.") (emphasis added); S. Rep. No. 102-92, 1992 U.S.C.C.A.N. at 1157 ("[T]here are certain major programmers that are more able to fend for themselves. It is difficult to believe a cable system would not carry the sports channel, ESPN, or the news channel, CNN."); *id.* at

In addition, in the Commission's recent annual video competition report, which discusses the program access rules at length,[33] Discovery Kids and other programming networks are commonly and repeatedly denoted as "channels:"

> There are nearly 30 premium channels available, including National Geographic Channel, Disney Channel, Animal Planet, Discovery Channel, Cartoon Network, CNN, and HBO.[34]

The Commission's own rules also offer multiple examples of channel, in context, referring to a separate programming network, and independent of any sort of transmission path. As one example, Section 79.1 of the Commission's Rules, which expressly applies the same definition of MVPD as does the program access rules,[35] refers, on several occasions, to channels.[36] Each of these subsections refers to channels as a single concept, even though the rule intends to cover MVPDs, television channels, and even video programming providers.[37]

Moreover, in the Commission order that promulgated Section 79.1, the Commission consistently referred to channel to mean a source of video programming, independent of any transmission path or technical details, including:

1158 (In noting that vertical integration gives cable operators the incentive and ability to favor their affiliated programming services, the Committee stated, "For example, the cable operator might give its affiliated programmer a more desirable channel position than another programmer, or even refuse to carry other programmers.").

[33] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Thirteenth Annual Report, 47 C.R. 1, FCC 07-206, ¶¶ 195-201 (2009) ("*13th Annual Assessment*").

[34] *Id.* at ¶ 285. Footnotes 746 and 748, among others, similarly show other MVPDs referring to a programming stream as a channel, including Discovery Kids. ("Comcast reports that its family tier package includes the basic tier plus selected additional channels such as PBS Kids Sprout, Disney Channel, Toon Disney, Nickelodeon, and Discovery Kids.") (citations omitted.)

[35] *See* 47 C.F.R. §79.1(a)(2) (defining a "video programming distributor" to include "[a]ny television broadcast station licensed by the Commission and any mutlichannel video programming distributor as defined in § 76.1000(e) of this chapter . . .").

[36] *See, e.g.*, 47 C.F.R. §§79.1(d)(11), (d)(12) and (f)(1).

[37] Sky Angel takes this opportunity to note that it has made substantial progress in its efforts, which began prior to the present program access dispute, to fully caption its programming. Specifically, Sky Angel currently is conducting a beta test and, pending successful results, intends to begin providing closed captioning to all of its subscribers within the next few weeks.

> Under our rules, compliance is measured on a channel-by-channel basis, and thus the captioned programs will reflect the overall diversity of the many channels of programming now available. . . .[38]

> Compliance with our closed captioning requirements will be measured on a channel-by-channel basis . . . [B]y measuring compliance on a channel-by-channel basis, a network will be able to set budgets and hire staff based on the requirements applicable for its own programming, without having to factor in the efforts of others . . . We believe that it is important to increase the availability of closed captioning on each channel of video programming over the transition period to provide persons with hearing disabilities a wide range of programming choices.[39]

At no point does Section 79.1 suggest that "channel" refers to any sort of technical definition involving a transmission path that varies depending on the form of a video programming distributor. Such a reading would be ridiculous, especially with respect to Sections 79.1(d)(11) and (12), which refer to a channel vis-à-vis a video programming provider:

> No video programming provider shall be required to expend any money to caption any video programming if such expenditure would exceed 2% of the gross revenues received from that channel . . .[40]

> No video programming provider shall be required to expend any money to caption any channel of video programming producing annual gross revenues of less than $3,000,000 during the previous calendar year . . .[41]

As a video programming provider does not provide any sort of transmission path to a residence or consumer, an interpretation of the term "channel" in a technical sense to imply the provision of a transmission path in the context of Section 79.1 is impossible. However, Section 79.1 also expressly ties its meaning and scope to the program access rule. Given the linkage between the

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[38] *Closed Captioning and Video Description of Video Programming*, Report and Order, 12 FCC Rcd 3272, 3278 (1997) ("*Captioning First R&O*").

[39] *Id.* at 3309; *See id.* at 3276-77 ("[A]s the number of channels of video programming continues to increase . . ."); *id.* at 3391 ("[Public, educational and governmental] channels generally operate on very limited budgets . . .").

[40] 47 C.F.R. §79.1(d)(11).

[41] 47 C.F.R. §79.1(d)(12); *see also* 47 C.F.R. §79.1(f)(1) ("A video programming provider, video programming producer or video programming owner may petition the Commission for a full or partial exemption from the closed captioning requirements. Exemptions may be granted, in whole or in part, for a channel of video programming . . .") (emphasis added).

rules, the definition of "channel" for purposes of Section 79.1 must be read to mean the same as in the program access rules because using the same term to mean two different things would make both the captioning and program access rules incomprehensible and arbitrary.

Finally, to the extent Discovery alleges that Sky Angel does not make use of electromagnetic frequency spectrum, Discovery obviously fails to understand what the electromagnetic frequency spectrum encompasses. Electromagnetic frequencies are any frequencies that transmit or convey radiative energy (as opposed to, for example, heat or mechanical energy). Any transmission of energy through a wire, other than heat energy, requires the use of electromagnetic frequencies. Accordingly, virtually all modern transmission of video programming, whether by wire, fiber optics, or over-the-air, and including Sky Angel, uses electromagnetic frequencies. Indeed, under Discovery's unclear definition, which would appear to require use of over-the-air spectrum, many cable systems that do not rely on over-the-air spectrum would fail to qualify as MVPDs.[42]

3. "Video programming."

It is beyond dispute that the programming channels that Discovery now denies Sky Angel's customers constitute "video programming" subject to the program access rules, as confirmed by the statutory definition of "video programming."[43] Sky Angel's system distributes programming of a higher video quality than a typical over-the-air standard definition television station, which no party would dispute qualifies as video programming. Sky Angel clearly informs all potential subscribers that they must have a sufficiently fast broadband connection to

[42] As an aside, Sky Angel also uses satellite uplinks and downlinks to gather programming before transmitting it to subscribers, so Sky Angel also uses over-the-air electromagnetic frequency spectrum subject to its control as part of its distribution system.

[43] *See* 47 U.S.C. §522(20) ("the term 'video programming' means programming provided by, or generally considered comparable to programming provided by, a television broadcast station.").

receive Sky Angel's service. If a consumer does not have the required connection speed, it would not receive Sky Angel's service.[44] If a consumer subscribes to Sky Angel's service despite this explicit caution, Sky Angel releases the consumer from its subscription obligations and provides a full refund to the mistaken subscriber.

Discovery's contention that the Commission has consistently held that video delivered via the Internet is not video programming is misplaced because, as Discovery expressly notes, all of the cited precedent relates to "web-based" video, not IP-formatted video delivered in part through the use of a broadband Internet connection, such as with Sky Angel's service. As detailed *infra*, "Internet" and "World Wide Web" are discrete terms, so any general references to "Internet" video when the writer intended its usage to apply only to "web-based" video are irrelevant here, and as to Sky Angel's service.[45]

In arguing that Internet video lacks sufficient quality to constitute "video programming," it is noteworthy that Discovery principally relies upon a Commission report from 2001 which found that, based on year-2000 data, most broadband providers could not guarantee an Internet speed of 300 kbps – a speed the Commission noted was required to deliver television-quality video.[46] Sky Angel's marketing materials make very explicit that subscribers should have a

[44] If the connection speed is insufficient, Sky Angel-distributed programming cannot be viewed. Similar to digital broadcast technology, the consumer does not receive a degraded signal. In other words, it is "all-or-nothing."

[45] The often non-technical usage of the terms "Internet" and "World Wide Web" likely also led to Discovery's confusion regarding legislation proposed in 2009. *See Answer*, pp. 14-15. In addition, far from recognizing any exclusions from Title VI's definition of video programming, the bill proposes to add a definition to Title VII of the Act. Finally, if anything can be inferred from the proposed new Title VII definition, it is simply that Congressman Markey intended to make explicit what he believed to be implicit in the flexible Title VI definition drafted many years earlier.

[46] *Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Seventh Annual Report, 16 FCC Rcd 6005, 6054 (2001); *see Annual Assessment of the Status of Competition in the Market for the Delivery of Video Programming*, Notice of Inquiry, 19 FCC Rcd 10909, 10932 (2004) (noting, in 2004, that "[a]s video compression technology improves, data transfer rates increase, and media adapters that link TV to a broadband connection become more widely used, it is believed that video over the Internet will proliferate and improve in quality.").

broadband connection speed of approximately 1.5 Mbps. In reality, subscribers can receive Sky Angel's high-quality digital video programming with a speed as low as 900 kbps. Significantly, unlike in 2000 when broadband Internet access was in its infancy, today nearly two-thirds of American adults have adopted broadband at home,[47] 95% of the American population have access to terrestrial, fixed broadband infrastructure capable of supporting actual download speeds of at least 4 Mbps,[48] and by 2013 it is likely that 90% of the country will have access to advertised peak download speeds of more than 50 Mbps.[49]

Discovery also implies that any programming that is "streamed" cannot fit within the definition of "video programming." Streaming video, however, is a technological innovation increasingly being used to solve current bandwidth constraints. For example, the Commission has noted that, in order to address capacity problems, cable operators are turning to Switched Digital Video, "which combines the bandwidth efficiency of compressed digital content with switching technology to enable content to be streamed to viewers only upon request."[50]

D. The Public Interest Requires Sky Angel's Consumers to be Protected by the Program Access Rules.

In this era of dramatically increasing access to and use of high-speed broadband connections, the public interest requires that an innovative company such as Sky Angel, which is attempting to utilize this new technology to distribute family-friendly programming at affordable rates, receives the benefits of the Commission's program access rules because, ultimately, it will

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[47] *See Broadband Plan*, p. 23.

[48] *Id.* at 20.

[49] *Id.* at 20-21.

[50] *13th Annual Assessment*, 47 C.R. 1, FCC 07-206, ¶ 276 (emphasis added) (adding that "[t]he availability of open, IP-based architecture has catalyzed the development of reliable, cost-effective, and scalable solutions to this inefficiency.").

be the American public that benefits from this inclusion because of the increased competition, innovation, and amount of programming available to them.

In continuing to fail to differentiate between Sky Angel's service, which simply utilizes the Internet as one link of its distribution system, and web-based video providers, which make unencrypted video programming available on a publicly accessible website, Discovery wrongly states that applying the program access rules to Sky Angel could unleash a flood of regulatory consequences.[51] Sky Angel's system, as previously detailed to the Commission,[52] requires an extensive amount of hardware and technology to capture, prepare, and distribute programming to its subscribers. In addition, in order to receive the service, a proprietary set-top box must be connected to each television set intended to receive Sky Angel's service. This system is in stark contrast to a web-based video provider, who simply needs to purchase a server and create a publicly available website. Accordingly, a Commission finding that Sky Angel is an MVPD for purposes of the program access rules would only permit a limited number of additional entities to claim similar rights while still advancing Congress' goal of increased competition.

Rather, what Discovery is asking the Commission to do would deprive many consumers, not just those of Sky Angel, from Commission safeguards with respect to program access requirements and other consumer-oriented protections. Except in extraordinarily rare circumstances, the Communications Act does not extend Commission jurisdiction over video programming distributors that do not qualify as either television broadcast stations or MVPDs (or some named subset thereof). In addition, as the program access rules themselves demonstrate, the Commission has very limited authority with respect to programming and programmers, which is why the Commission frequently regulates one or both classes of

[51] *See Answer*, p. 17.

[52] *See Complaint*, Attachment A.

distributors (or a subset thereof) in order to regulate video programming.[53] But Discovery now urges the Commission to limit the definition of MVPD so as to deny Commission authority over any programming distributor that relies on a subscriber's Internet access for any path within its overall distribution system.

As an initial matter, the consequences if the Commission adopts Discovery's arguments would have sweeping and distortive effects on the video distribution market, contrary to the purpose of the program access rules.[54] In a number of contexts, the Commission has recognized that distinguishing among delivery technologies adversely affects competition.[55]

In this time of innovation and potentially increasing competition in the video delivery marketplace, any ruling that denies the Commission authority with respect to Sky Angel also will deny the Commission authority as to many other innovative video programming distributors – or traditional cable systems – that may use the Internet as a link in their distribution chain, including, but not limited to, over-the-top distributors. Sky Angel is just one of many innovators seeking to deliver video programming to viewers through means not expressly identified in the Communications Act,[56] and one that has much more in common with traditional MVPDs. For example, because subscribers cannot access Sky Angel's programming channels without the use of a set-top box, Sky Angel is far similar in nearly all respects to a traditional cable or DBS operator than a web-based video distributor. Any ruling denying MVPD treatment to Sky Angel

[53] *See, e.g.*, 47 C.F.R. §§76.1000 and 79.1.

[54] *See Terrestrial Rules Order*, 25 FCC Rcd at 153-54, ¶ 13 and nn. 33-34 (noting that the program access rules are intended to combat the "imbalance of power between incumbent cable operators and their multichannel competitors" and noting that "vertically integrated cable programmers have the incentive and ability to favor cable operators over other video distribution technologies") (emphasis added).

[55] *See* n. 26, *supra*; *Captioning First R&O*, 13 FCC Rcd at 3278-79 (noting that the Commission sought "to promote competition" by applying captioning rules "evenhandedly" so as to "maintain competition among video programming distributors regardless of the technologies used.").

[56] *See, e.g.*, David Hatch, *Panel Explores Overhaul of Video Program Access Rules*, Congress Daily (Apr. 28, 2010); Harold Feld, *Bad News For Over-The-Top Video Providers Last Week*, Public Knowledge (Apr. 25, 2010) (available at www.publicknowledge.org/node/3022).

would likely preclude Commission oversight of many new MVPD competitors, as well as long-recognized MVPDs that begin to utilize new distribution technologies. In turn, this would undermine the Commission's recent efforts to "facilitate competition in the video distribution market" by eliminating other alleged loopholes to application of the program-access rules.[57] Because the stated purpose of the program access statute was to "spur the development of communications technologies,"[58] an unnecessarily narrowed reading of MVPD in this context would be especially arbitrary and ironic.

The dangers of Discovery's self-serving definition of MVPD may have other negative consequences as well. As one possible example, any cable system that offers Internet access to its cable subscribers may be able to sidestep the consumer protections set out in other sections of the Commission's rules that apply to programming on cable systems or even to MVPDs, but not as clearly to other types of video distributors.[59] Assuming the system has the necessary copyright licenses and programming agreements, neither of which are matters within the Commission's oversight, what had been deemed a cable system may choose instead to distribute its programming to a subscriber's home via the Internet or simply "re-classify" its last-mile connection as a broadband connection. Because many cable systems today also provide Internet access, such a changeover should be technically feasible.

III. SKY ANGEL TIMELY FILED ITS PROGRAM ACCESS COMPLAINT

Sky Angel filed its program access complaint in compliance with the program access statute of limitations. The discriminatory act about which Sky Angel complains was Discovery's threatened, and now actual, withholding of its programming. This act occurred no earlier than

[57] *See Terrestrial Rules Order*, 25 FCC Rcd at 749-750.

[58] *See* 47 U.S.C. §548(a).

[59] *See, e.g.*, 47 C.F.R. §§79.1 and 79.2.

December 2009. Sky Angel filed its program access complaint within one year of this act and within one year of its pre-filing notice. Accordingly, Sky Angel filed its complaint in compliance with the statute of limitations applicable here.[60]

The Commission must reject Discovery's argument that the one-year statute of limitations was triggered by the execution of the Affiliation Agreement. Sky Angel has made clear from the start of this proceeding that its Complaint is not based upon the legality of the Affiliation Agreement, but rather upon Discovery's unjustified and unreasonable withholding of its programming. In other words, Sky Angel is not complaining about a termination provision contained in the Affiliation Agreement, even though Sky Angel has previously noted that both Maryland law, which the agreement is expressly subjected to, and the program access rules limit the broad authority Discovery contends it possesses under the Affiliation Agreement.

Discovery's reliance on the *EchoStar* case is misplaced. In that proceeding, the program access complainant alleged unlawful discrimination with respect to the prices, terms and conditions contained in an existing distribution agreement. More than a year after the execution of that agreement, EchoStar inquired as to whether the agreement contained rates comparable to those Fox charged cable companies. In response, Fox offered to renegotiate the terms of the agreement, after which EchoStar filed its program access complaint.[61] In contrast to this proceeding, that dispute clearly arose from allegedly discriminatory terms contained in a distribution agreement.

The issue here is the legality of Discovery's withholding of its programming. The triggering act therefore occurred no earlier than when Discovery first threatened to take this

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[60] *See* 47 C.F.R. §76.1003(g)(3).

[61] *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, Memorandum Opinion and Order, 13 FCC Rcd 21841 (1998); *EchoStar Communications Corp. v. Fox/Liberty Networks LLC*, Order on Reconsideration, 14 FCC Rcd 10480 (1999).

unreasonable action, which was in December 2009. Accordingly, Sky Angel filed the Complaint long before the expiration of the applicable statute of limitations.[62]

IV. DISCOVERY UNLAWFULLY DISCRIMINATED AGAINST SKY ANGEL

By unjustifiably withholding its programming in contravention of the program access rules and the parties' Affiliation Agreement, Discovery unreasonably refused to sell its programming to Sky Angel.[63] Since the Commission first adopted its program access rules, it has recognized that actions such as these are impermissible forms of non-price discrimination.[64] Discovery's withholding of its programming was unreasonable for several reasons: it lacked any true explanation whatsoever, thereby preventing Sky Angel from addressing Discovery's alleged

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[62] *See WealthTV v. Time Warner Cable Inc.*, Memorandum Opinion and Hearing Designation Order, 23 FCC Rcd 14787, ¶ 70 (2008) (rejecting the "argument that the one-year statute of limitations is triggered by the execution of the agreement because that act did not give rise to the discrimination claim . . ."); *id.* at ¶ 105 (finding that, even though the agreement committed Comcast's future carriage decisions to its "discretion," the agreement did "not indicate that MASN waived its statutory program carriage rights with respect to Comcast's exercise of such discretion. Accordingly, MASN's claims based on Comcast's exercise of its discretion pursuant to the [agreement] are not subject to the one-year limitations period in Section 76.1302(f)(1)."). Although these proceedings related to program carriage disputes brought pursuant to Section 76.1302 of the Commission's rules, the same rationale must apply here because the Commission has consistently treated program-related complaints in a similar fashion. *See, e.g., Implementation of Section 12 and 19 the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Second Report and Order, 8 FCC Rcd 2642, 2652 (1993) ("We believe that a complaint process derived from the process we established for adjudicating undue influence complaints filed pursuant to Section 628(c)(2)(A) of the program access provisions of the 1992 Cable Act will provide the most flexible and expeditious means of enforcing the carriage agreement provisions of Section 616."); *Implementation of the Cable Television Consumer Protection and Competition Act of 1992; Development of Competition and Diversity in Video Programming Distribution and Carriage*, Memorandum Opinion and Order, 9 FCC Rcd 4415, 4419 (1994) ("Congress routinely treated Sections 616 and 628 in concert . . ."); *1998 Biennial Regulatory Review; Part 76 – Cable Television Service Pleading and Complaint Rules*, Order on Reconsideration, 14 FCC Rcd 16433, 16435 (1999) ("The dispute resolution process in Part 76 for program access, program carriage and open video system complaints follow similar procedural rules . . ."); *1998 Biennial Regulatory Review; Part 76 – Cable Television Service Pleading and Complaint Rules*, Report and Order, 14 FCC Rcd 418, ¶ 18 (1999) ("We adopt a procedural amendment clarifying essentially similar provisions related to the one-year limitations period for filing program access, program carriage and open video system complaints.").

[63] Despite Discovery's contention to the contrary, *see Answer*, p. 27, this proceeding clearly is a "refusal to sell" case. The only precedent cited by Discovery for this contention involved the withholding of programming after an alleged breach of contract by the MVPD. *See EchoStar Communications Corp. v. Speedvision Network, LLC*, Memorandum Opinion and Order, 14 FCC Rcd 9327, 9337 (1999). Discovery has never, and cannot reasonably, allege that Sky Angel breached their agreement. Rather, here it is the withholding programmer who allegedly breached a contract.

[64] *First Program Access Order*, 8 FCC Rcd at 3412 ("[W]e believe that one form of non-price discrimination could occur through a vendor's 'unreasonable refusal to sell,' including refusing to sell programming to a class of distributors . . .").